

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 998 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

NATHAJI HARTANJI

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for Petitioners
MR YF MEHTA, APP, for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 24/01/97

ORAL JUDGEMENT: (Per Gokhale, J.)

1. This appeal arises from the judgment of the learned Additional Sessions Judge, Mehsana, in Sessions Case No.40 of 1989, which was decided on 10th October, 1990. The appellants herein were all accused in that Sessions Case and all of them have been convicted under

Section 302 read with Sections 147, 148 and 149 as also under Section 323 read with section 149 of the Indian Penal Code. They have been sentenced for life and to pay fine of Rs.5000/-, and in default, to undergo simple imprisonment for six months. They have also been sentenced for six months simple imprisonment and to pay fine of Rs.200, and in default, simple imprisonment for one month for the offence under Section 323 read with Section 149 of the Indian Penal Code. The sentences were directed to run concurrently.

2. The incident leading to this Sessions Case took place on 19th October, 1988 at about 11 P.M. in village Ladol, district Mehsana. It is alleged against the accused that they had formed an unlawful assembly with a view to murder one Fakirji Shivaji Thakore. On the fateful day, accused No.1 carried Dharia with him, accused No.2 had stick, accused No.3 had knife, accused No.4 had stick, accused No.5 had Dharia, accused Nos.6 and 7 both had sticks and accused No.8 had sword, and all of them attacked the deceased Fakirji Shivaji Thakore in the said village with a view to murder him and was done to death on the same day at the same spot.

3. During the trial, various witnesses were examined. Two of them are eye-witnesses, namely, one Lavingben, aged about 60 years and who is the mother of the deceased, and one Kadvaji, uncle of the deceased. Both of them have graphically described the occurrence of the incident. They have deposed thiswise, that the accused were staying in a house known as Ordiwalo Vas whereas the deceased was staying in a locality known as Karodiwalo Vas. It appears that, there were altercations between the residents of the two locality earlier in the month of March, 1988, on the day of Dhuleti, with respect to the right of either of the parties to beat drum first. The parties were carrying the controversy all these days. On the particular day, it is stated by this Lavingben, that the accused, as armed as stated above, came to trace one Dasharatji and one Cheharaji. Thus, Lavingben, her brother-in-law one Kadvaji and the son of Lavingben, the deceased Fakirji, came on to the road to prevent this oncoming group and to ward them off. But then this group seized Fakirji and then Lavingben, P.W.2, states that accused No.3 hit the deceased with knife, accused No.1 hit him with Dharia, accused No.8 used a sword and accused No.5 used a Dharia. All these blows led to the fall of Fakirji on the floor and then the others used sticks in their hands and assaulted him. Lavingben states that, all surrounded the deceased while assaulting him and that she knows all of them. She states that

Fakirji died on the spot, she took him in her lap and started crying and shouting. Thereafter, other people came there and the assailants ran away. Her version is by and large corroborated by the uncle of the deceased, Kadvaji, who was present on the spot.

4. Dr. Arvind Kapadia, who performed the postmortem on the deceased at about 8 A.M. on the next day has described the injuries which the deceased suffered on account of this assault. There are in all 19 external injuries and in his deposition, this doctor who was examined as P.W.3, has stated that injuries No.9, 12, 15 and 16 were sufficient in the ordinary course to cause the death of the person concerned. Injuries No.6 and 7 were on the head. Injury No.6 was a 3" x 1" deep wound on the top of the head. Similarly, injury No.7 is described as a injury on the rear left side of the head. It is a depressed injury of 1" x 1/2". Injuries No.9 to 12 are wheel marks. They are all on the left side of the chest of the deceased and corresponding to these injuries No.9 to 12, ribs of the deceased on the left side were broken. Doctor describes that the same led to the breakage of ribs No.4, 5, 9 and 10. Injuries No.15 and 16 were on the left and right legs respectively causing fracture on both of them. The breakage of the ribs led to the injuries to the spleen and lungs causing internal bleeding leading to the death of the deceased.

5. All the accused denied the charges and faced the trial. The learned Additional Sessions Judge, after going through the evidence which was led on behalf of the prosecution, came to the conclusion that the aforesaid charges have been established and, accordingly, imposed the punishments as stated above.

6. Mr. Anandjiwala, learned Advocate appearing for all the appellants, raised mainly four submissions. The first submission was that from the statement of Lavingben, it appeared that the accused did not inflict blows at the same time. Some had come earlier and gave the blows and ran away and, thereafter, the others. The evidence of Lavingben, P.W.2, however, does not lead to such an inference. All that she has stated is that, as far as the one who gave the blow by sword is concerned, he gave the blow and ran away from the place. She has not said anything in the same way about others. The second submission of Mr. Anandjiwala was with respect to the time of occurrence of the offence. He tried to submit based on the cross-examination of Dr. Kapadia that it could not be said that the offence had occurred at 11 P.M. on 19.10.1988, as alleged. The doctor has,

however, described the process and the principles governing rigor mortis and has stated that earlier when he saw the body, at about 2 o' clock in the night, rigor mortis has spread on part of the body and whereas when he performed the postmortem, it had covered the entire body. He, therefore, had opined that the death might have been caused 12 to 24 hours prior to the postmortem examination. There is no reason to disturb this expert observations.

7. Similarly, there is another submission made based on the alleged discrepancies with respect to the description of the injuries in the Inquest Panchnama and the postmortem. What has happened is that some of the weel marks have not been noted when the inquest was done. It is to be noted that the offence took place at about 11 o' clock in the night, whereafter immediately the inquest was done and in such a situation, it is possible that some of the weel marks might have been missed. Lavingben, the mother of the deceased, and Dr. Kapadia both have been subjected to thorough cross-examination and have stood their ground.

8. The last submission was that, at the place of offence, there was no sufficient light, so that it cannot be definitely said that the complainant saw the incident clearly. As far as Lavingben is concerned, she has clearly stated in her cross-examination that at the place where the offence took place, although it was dark, there were two lights burning and both of them were at the place where the incident took place.

9. Thus, from what is stated above, what emerges it that all the accused were very much there at the time when the incident took place and that they have used the respective weapons which have been alleged to be used by them as stated by Lavingben. The blows given by the accused led to in all 19 external injuries as stated above. As far as the rivalry between the residents of the two localities is concerned, the same has also amply come on record. Kadvaji, P.W. 4, in his cross-examination has stated that the relations between the two parties were strained right from the time when the earlier incident took place some eight months ago. Chapter cases were filed by both the parties and such cases were pending against all the eight accused. He was asked as to whether any incident took place during the intervening period, to which he replied that, although no such incident has taken place, no settlement of the controversy had also been arrived at.

10. All these incidents clearly indicate that the accused did have a common objective and that they came together as an unlawful assembly and attacked the locality where the deceased was residing. Hence, it cannot be disputed that Section 149, I.P.C. will apply with all force. I also similarly cannot be disputed that the death of Fakirji is a homicidal death.

11. The only question which remains to be considered is as to whether the accused had a specific object to murder Fakirji. The charge, as is levelled against the accused, is that they formed the unlawful assembly to murder this Fakirji. As far as that aspect is concerned, Mr. Anandjiwala submitted that all that is alleged against the accused is that they were chasing two other persons, and that they did not have a specific intention to murder this very person. In these circumstances, it will be difficult to uphold the conviction of the accused under Section 302, I.P.C. Mr. Anandjiwala submitted that the case ought to have been considered as one under Section 304, I.P.C. In our view, in the facts of the case, this submission is well taken and it should be Section 304 Part I, which will apply to the facts of the present case.

12. In these circumstances, the appeal is partly allowed. The conviction under Section 302 against the appellants-accused is altered to that under Section 304 Part I, I.P.C. That conviction, as altered, stands with Section 149, I.P.C. In the facts of the case, in our view, it will be appropriate, if the sentence is appropriately modified and altered from rigorous imprisonment for life to rigorous imprisonment for 10 years. As far as conviction under Section 323 read with Section 149, I.P.C. is concerned, we are not making any observations, as the accused have already undergone the sentence in respect of that conviction.

13. The incident took place on 19.10.1988 and accused Nos. 1 to 4 have been in custody since then. As far as accused No.4 is concerned, he expired thereafter and, hence, this appeal abates as far as he is concerned. As far as first three appellants-accused are concerned, the punishment which they have undergone will be adjusted against their sentence.

14. As far as accused-appellants No.5 to 8 are concerned, they were granted bail by order of this Court dated 2nd July, 1991. Mr. Anandjiwala requests that they be given time of four weeks to surrender. Request is granted.

